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## Oklahoma's Proposed Rules of Professional Conduct: Changes That May Affect You

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## OKLAHOMA'S PROPOSED RULES OF PROFESSIONAL CONDUCT: CHANGES THAT MAY AFFECT YOU

### I. INTRODUCTION

The Oklahoma Bar Association (OBA) proposed adoption of a revised version of the *Model Rules of Professional Conduct* (*Model Rules*) to replace the Oklahoma *Code of Professional Responsibility* (*Oklahoma Code*).<sup>1</sup> The Oklahoma Bar is presently awaiting approval of the *Proposed Oklahoma Model Rules of Professional Conduct* (*Proposed Rules*) by the Supreme Court of Oklahoma. Although the essence of the present legal ethics standard is basically the same as the *Proposed Rules*, there are some significant changes which may affect the attorney in his daily practice.

Changes reflected in the *Proposed Rules* which may have a great effect on the attorney are in the areas of fee regulations, client confidences, conflicting interests, lawyer advertising, and subordinate lawyer's duties. In addition, the *Proposed Rules* offer a much different format than the present code. The *Oklahoma Code* does not include the Ethical Considerations as provided by the American Bar Association's (ABA) version of the *Model Code*.<sup>2</sup> The *Proposed Rules*, however, include explanatory comments which follow each rule. These explanatory comments, although not construed as law, offer needed guidance in the interpretation and application of the *Proposed Rules*.<sup>3</sup> The result is a clearer and more efficient model of legal ethics for the practitioner.

The ABA proposed the *Model Rules* in 1983<sup>4</sup> as a replacement for the ABA *Model Code* adopted in 1969.<sup>5</sup> Currently, twenty-four states

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1. Oklahoma Model Rules Committee, *Letter Regarding Proposed Model Rules* (September 3, 1986), printed in 57 OKLA. B.J. 1995 (1986).

2. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE], Preamble and Preliminary Statement (1978). The ethical considerations of the MODEL CODE were never adopted by Oklahoma, and thus, never caused a problem in this state. Compare with OKLA. STAT. tit. 5, ch. 1, app. 3 (1984 & Supp. I 1986).

3. See *Proposed Oklahoma Model Rules of Professional Conduct*, 57 OKLA. B.J. 1994, 2000 (1986) [hereinafter *Proposed Rules*]. "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rules. . . . The Comments, which embody Oklahoma changes, are intended as guides to interpretation, but the text of each Rule is authoritative." *Id.*

4. See Oklahoma Model Rules Committee, *supra* note 1.

5. See OKLA. STAT. tit. 5, ch. 1, app. 3, Order (1981).

have adopted the *Model Rules* in some form, and nine other jurisdictions are awaiting approval by their respective supreme courts.<sup>6</sup>

The *Proposed Rules* reflect the combined efforts of the ABA and the Oklahoma Model Rules Committee to provide Oklahoma practitioners with a modern, workable code of legal ethics. The weaknesses of the *Proposed Rules* are few when compared with the greater scope of interpretation, simplification of format, and clarity of language offered by the *Proposed Rules*.

## II. HISTORY OF LEGAL ETHICS

General rules governing legal ethics have existed in the United States since colonial times.<sup>7</sup> David Hoffman, a Baltimore lawyer, wrote the first published code of legal ethics in 1836. This code, entitled *Fifty Resolutions in Regard to Professional Deportment*, avowed as its purpose that the lawyer should "attain eminence in [the] profession, and to leave this world with the reputation of having lived an honest lawyer."<sup>8</sup>

In 1887, the Alabama State Bar Association adopted the first fully formulated code of legal ethics, and in the following twenty years, sixteen states adopted some form of legal ethics standard.<sup>9</sup> In 1905, the ABA set out to devise a national standard of ethical conduct.<sup>10</sup> The *Canons of Professional Ethics* (*Canons*) were officially adopted in 1908.<sup>11</sup> Oklahoma, along with many other states, incorporated the *Canons* as law.<sup>12</sup>

As early as 1935, critics were concerned that the *Canons* were not able to meet the needs of the practitioner; however, no change was made for several years.<sup>13</sup> In 1964, the ABA created the Special Committee on

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6. Twenty-four states have adopted the MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] in some form: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Virginia, Washington, Wisconsin, and Wyoming. Law. Man. on Prof. Conduct (ABA/BNA) No. 50, at 3 (July 22, 1987). Nine jurisdictions are recommending adoption of some form of the MODEL RULES: Alabama, *id.* No. 14, at 247-48 (Aug. 5, 1987); District of Columbia, *id.* No. 23, at 461-62 (Dec. 10, 1986); Illinois, *id.* No. 40, at 881-82 (July 24, 1985); Michigan, *id.* No. 3, at 70-71 (Feb. 22, 1984); Oklahoma, *id.* No. 1 at 13-15 (Feb. 4, 1987); South Carolina, *id.* No. 46 at 1006-07 (Oct. 16, 1985); South Dakota, *id.* No. 14, at 247-48 (Aug. 5, 1987); Utah, *id.* No. 40, at 881 (July 24, 1985); West Virginia, *id.* No. 53, at 1142 (Jan. 22, 1986).

7. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978).

8. *Id.* at 1064.

9. *Id.* at 1063-64.

10. *Id.* at 1064.

11. *Id.*

12. See OKLA. STAT. tit. 5, ch. 1, app. 3 (1981 & Supp. I 1986).

13. Armstrong, *supra* note 7, at 1068.

Evaluation of Ethical Standards.<sup>14</sup> Following five years of research, the Special Committee provided the ABA with a final draft of their proposed *Code of Professional Responsibility*.<sup>15</sup> It was unanimously approved by the House of Delegates of the ABA and formally adopted in Oklahoma in 1970.<sup>16</sup>

Seven years after adopting the *Model Code*, the ABA Board of Governors accepted the recommendation that the *Model Code* needed to be revamped and that the entire range of ethical lawyering needed to be re-evaluated.<sup>17</sup> The ABA created the Commission on Evaluation of Professional Standards (also known as the Kutak Commission);<sup>18</sup> and after years of debate and interaction with lawyers across the country, the ABA adopted a final draft of the *Model Rules*.<sup>19</sup>

The OBA appointed a committee in 1983 to study the *Model Rules*.<sup>20</sup> For three years the committee solicited suggestions and criticisms from individual members of the OBA.<sup>21</sup> The House of Delegates adopted the *Proposed Rules* at their November, 1986, meeting,<sup>22</sup> and the Oklahoma Bar is awaiting final approval of them by the Oklahoma Supreme Court.

### III. CHANGES FOR THE BETTER

#### A. *Problems with the Oklahoma Version of the Model Code*

The *Model Code* has been widely criticized for its confusing format,<sup>23</sup> which has also caused problems for the Oklahoma practitioner.

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14. *Id.* at 1069.

15. *Id.*

16. See OKLA. STAT. tit. 5, ch. 1, app. 3 (1981 & Supp. I 1986).

17. Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A. J. 46, 47 (1980).

18. Kutak stated:

What the commission has done is to take the underlying structural thrust of the Code of Professional Responsibility—its bifurcation of disciplinary rules and ethical considerations—to its next logical step by drafting rules that are the legal foundation of good professional conduct, although not necessarily exhaustive. The effort is to state the necessary, but not the entire, content of ethical lawyer behavior.

*Id.*

19. MODEL RULES (1983).

20. Oklahoma Model Rules Committee, *supra* note 1.

21. Comments were solicited in response to a special publication of the initial draft of the *Proposed Rules* as they appeared in *Proposed Oklahoma Model Rules Of Professional Conduct As Drafted And Recommended By The OBA Model Rules Committee*, 56 OKLA. B.J. 1888 (1985).

22. See Resolution 14, *Highlights—House of Delegates; 82nd Annual Meeting, Oklahoma Bar Association*, 57 OKLA. B.J. 2929, 2931 (1986).

23. Many articles compare the MODEL CODE and the MODEL RULES. See Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823 (1986); Gaetke, *Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct*, 74 KY. L.J. 581 (1985-86); Gillers, *What We Talked About When We*

The *Model Code* includes three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons provide the general concepts from which the Ethical Considerations and Disciplinary Rules are developed.<sup>24</sup> The Disciplinary Rules represent the minimum ethical requirements expected of the lawyer and are mandatory in character.<sup>25</sup> The Ethical Considerations are aspirational goals which the ABA recommends that the lawyer should strive to follow.<sup>26</sup> As a result of confusion in the application of Ethical Considerations, courts and bar disciplinary authorities have imposed sanctions against the lawyer for noncompliance with Ethical Considerations in some instances and have treated Ethical Considerations as having no weight in others.<sup>27</sup> Oklahoma never adopted the Ethical Considerations as law; therefore, they have not been a basis for litigation in this state. However, Oklahoma practitioners have had to research ABA and OBA ethics opinions and case law to obtain guidance on certain ethical questions.<sup>28</sup> The Oklahoma lawyer should not have to conduct extensive research to determine his course of action involving common ethical questions.<sup>29</sup> Thus, the *Proposed Rules* will eliminate the need for such research.

Another criticism of the *Model Code*, which pertains equally to the *Oklahoma Code*, is its inability to meet the demands of today's legal profession.<sup>30</sup> Rooted in canons developed at the turn of the century, the *Model Code* reflects a more simplified era and does not contemplate the

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*Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Kuhlman, *Pennsylvania Considers the A.B.A. Model Rules of Professional Conduct*, 59 TEMP. L.Q. 419 (1986); Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L.J. 443 (1985).

24. The MODEL CODE, Preamble and Preliminary statement, states:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

*Id.*

25. *Id.* "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

26. *Id.* "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." *Id.*

27. Aronson, *supra* note 23, at 826.

28. Oklahoma Model Rules Committee, *supra* note 1, at 1996.

29. *Id.*

30. Aronson, *supra* note 23, at 828. The Oklahoma CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter OKLAHOMA CODE] is basically the same as the MODEL CODE. Thus, these criticisms apply to the OKLAHOMA CODE.

impact that cultural and technological change has had on the legal profession.<sup>31</sup> Additionally, the *Oklahoma Code* deals with the lawyer primarily as a litigator and fails to meet the needs of the lawyer in his other roles as a practitioner.<sup>32</sup> The *Proposed Rules* address this issue and provide guidelines for the attorney as an advisor of clients, as an intermediary between clients, and as an evaluator of client information to be provided for the use of others.<sup>33</sup> They also provide guidelines for the attorney's role in supervising subordinate attorneys, interns, and nonlawyer assistants.<sup>34</sup>

In addition to its outdated and inflexible approach, the *Oklahoma Code* presents other problems which the *Proposed Rules* will correct. The *Oklahoma Code* includes rules that directly conflict with one another and originally included rules that subsequently have been declared unconstitutional. For example, the *Oklahoma Code* contains conflicting rules involving confidentiality within the client-lawyer relationship;<sup>35</sup> whereas,

31. *Id.*

32. *Id.*

33. *Id.* See *Proposed Rules*, *supra* note 3, Rule 2.1 (the lawyer as advisor), Rule 2.2 (the lawyer as an intermediary), Rule 2.3 (the lawyer as an evaluator of information for the use of third parties), at 2030-33.

34. See *Proposed Rules*, *supra* note 3, Rule 5.1 (responsibilities of a partner or supervisory lawyer), Rule 5.2 (responsibilities of a subordinate lawyer), Rule 5.3 (responsibilities of a lawyer regarding nonlawyer assistants), Rule 6.4 (lawyer's role in law reform activities), at 2047-53. In Kutak, *supra* note 17, the text reads:

Having established general professional standards for the client-lawyer relationship, the draft moves to consider the lawyer in specific roles. It is widely recognized that the present-day attorney is not only an advocate. Practitioners' activities demand they function as advisers, negotiators, mediators, and legal evaluators. Although basic concepts of loyalty, integrity, candor, and competence are constants, subtle variations in choice among competing values may arise in different settings of practice. The proposed rules thus treat each of these roles separately in the belief that a statement of professional standards must allow room for development of the attorney's role as an officer of the court, for example, or for exploring the implications of the social context in which clients are found, and the ensuing differences in societal expectations of the attorney's behavior.

*Id.* at 49.

35. OKLA. STAT. tit. 5, ch. 1, app. 3 (1981 & Supp. I 1986). Conflicting rules controlling attorney/client confidentiality include Canon 4 and DR 7-102 of the OKLAHOMA CODE. Canon 4 provides: "A Lawyer Should Preserve The Confidences and Secrets of a Client." DR 7-102(B)(1) provides:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

*Id.* MODEL CODE DR 7-102(B)(1) was amended in 1974 to exclude from the requirement, information protected by the client-lawyer privilege. Walter, *supra* note 23, at 449-50. This amendment was never adopted in Oklahoma.

the *Proposed Rules* more clearly give guidance in this area.<sup>36</sup> Furthermore, the *Oklahoma Code* rules on advertising were found to be unconstitutional.<sup>37</sup> Consequently, the *Proposed Rules* reflect the law as set out in the Supreme Court decisions dealing with advertising and solicitation.<sup>38</sup> Although the provisions declared unconstitutional have been amended in Oklahoma to satisfy constitutional requirements,<sup>39</sup> the *Oklahoma Code* still contains conflicting provisions regarding client confidentiality.<sup>40</sup>

Due to the many criticisms of the *Oklahoma Code*, the OBA has opted to replace it.<sup>41</sup> The *Oklahoma Code* has not kept pace with the cultural and technical demands of lawyering.<sup>42</sup> Additionally, the

36. See *infra* text accompanying notes 80-103.

37. Five Supreme Court decisions have vastly changed the lawyer's position toward advertising. *Zauderer v. Office of Discip. Counsel*, 471 U.S. 626 (1985) (solicitation in newspapers directed toward a specific group was protected by the first amendment); *In re R.M.J.*, 455 U.S. 191 (1982) (restricting lawyer advertising to certain categories of information was unconstitutional when the advertising was not inherently misleading); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (states may constitutionally protect persons from in-person direct solicitation for pecuniary gain because of the possible negative effects of such contact); *In re Primus*, 436 U.S. 412 (1978) (offering free legal advice through a non-profit organization was protected by the first and fourteenth amendments); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (prohibiting lawyer advertising was a first amendment violation of free speech, and blanket suppression of lawyer advertising inhibited the free flow of information needed to have an informed public).

Some states have gone even further than *Zauderer* in allowing protection of first amendment rights. *In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984) (the person receiving the mail solicitation "may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket." (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980))). As a result of *Von Wiegen*, direct solicitation mailings involving personal injury situations are protected in New York by the first amendment. DR 2-101 (communications concerning a lawyer's services) has been amended in Oklahoma twice; DR 2-102 (advertising) has been amended three times; DR 2-103 (personal contact with prospective clients) has been amended twice.

38. See *Proposed Rules*, *supra* note 3, at 2054. Oklahoma has proposed adopting Oklahoma DR 2-101 in lieu of the MODEL RULES' version of 7.1 (communications concerning a lawyer's services). However, Rule 7.1 is substantially identical to DR 2-101. Oklahoma has proposed adopting the language of DR 2-102 in lieu of MODEL RULES Rule 7.2 (advertising); these are substantially identical. MODEL RULES Rule 7.3 (direct contact with prospective clients) has been modified by the Oklahoma committee. DR 2-102(a) is substantially the same as Rule 7.3, with a modification to specifically reference paragraph (b). Rule 7.3(b) is substantially the same as DR 2-103(A)(1). Rule 7.3(c) is basically DR 2-103(C) (relating to in-person solicitation). Present DR 2-103(A)(2) and (B) (restricting group legal services) are eliminated. These Oklahoma modifications are considered to be as constitutionally sound as the MODEL RULES because they have been recently amended (in 1983) to reflect the latest Supreme Court decisions.

39. See *supra* note 37.

40. See *supra* note 35.

41. See Oklahoma Model Rules Committee, *supra* note 1.

42. See Aronson, *supra* note 23, at 826. The OKLAHOMA CODE is based on the ABA MODEL CODE. Therefore, Aronson's criticism of the MODEL CODE applies to the OKLAHOMA CODE as well.

*Oklahoma Code* fails to provide guidance as to the proper course of action with regard to common ethical questions.<sup>43</sup> Therefore, a change is in order.

## B. *Reasons to Adopt the Proposed Rules*

The Oklahoma Model Rules Committee,<sup>44</sup> after three years of study, recommended adopting the *Model Rules* with certain modifications. The committee cited four major reasons in favor of adoption of the *Proposed Rules*.<sup>45</sup> First, the format and arrangement of the *Proposed Rules* will enable the lawyer to quickly find relevant rules pertaining to specific subjects. Second, the *Proposed Rules* contain few substantive changes from the present *Oklahoma Code*. Third, the rules provide important guidelines that could formerly be found only in ABA and OBA ethics opinions and case law.<sup>46</sup> These rules eliminate an attorney's search for guidance in solving ethical problems common to the practice of law. Fourth, adoption of the *Proposed Rules* will allow uniformity among jurisdictions because several jurisdictions have adopted some form of the *Model Rules*.

The *Proposed Rules* provide a preamble addressing the lawyer's responsibilities and provide information explaining the scope of the rules in greater detail than the present *Oklahoma Code*. The *Proposed Rules* furnish a framework for regulating conduct through disciplinary agencies.<sup>47</sup> Failure to comply with a rule is a basis for invoking the disciplinary process; but all the facts and circumstances, including the possibility that the attorney may have had to act upon uncertain or incomplete evidence, will be considered.<sup>48</sup> In determining the lawyer's authority and responsibility, principles of substantive law outside of the rules will be considered to determine whether a client-lawyer relationship exists.<sup>49</sup> The *Proposed Rules* presuppose that the willfulness of the act, the seriousness of the violation, and the number of previous violations will be considered before

43. See, Oklahoma Model Rules committee, *supra* note 1.

44. The Oklahoma Model Rules Committee includes Gomer Smith, Jr., Chairman, John L. Arrington, Jr., Stewart J. Arthurs, John B. Johnson, Jr., Tom J. Ruble, William W. Means, Brian T. Hermanson, Richard A. Woolery, Doyle W. Argo, Judith L. Maute, and K. Lynn Anderson.

45. Oklahoma Model Rules Committee, *supra* note 1.

46. See, e.g., *Proposed Rules*, *supra* note 3, Rule 1.9 (conflict of interest with former client), Rule 1.10 (imputed disqualification of law firm), and Rule 1.11 (successive government and private employment), at 2017-22.

47. See *Proposed Rules*, *supra* note 3, at 2000-01. The *Proposed Rules* are not designed to be used by an antagonist in a collateral proceeding, or as a basis for civil liability.

48. *Id.*

49. *Id.*



sanctions will be administered against an attorney.<sup>50</sup>

The *Proposed Rules*, in contrast to the existing *Oklahoma Code*, state a rule that is either mandatory or permissive, followed by a comment that states the interpretation and possible application of the rule.<sup>51</sup> Oklahoma has proposed adopting the official comments of the ABA *Model Rules* where applicable, but will not construe the comment as law.<sup>52</sup> The *Proposed Rules* impose mandatory regulations where the words "shall" or "shall not" are used.<sup>53</sup> Conversely, where the words "may" or "may not" appear, the rule is permissive and allows the lawyer to exercise his or her own discretion.<sup>54</sup> Hopefully, this straightforward approach will allow better interpretation and easier application by lawyers, bar disciplinary authorities, and judges.

Another reason for adopting the *Proposed Rules* is that the format and arrangement will enable the lawyer to locate relevant sections that provide guidance on specific subjects. These rules list eight categories governing professional conduct: (1) client-lawyer relationship; (2) lawyer as counselor; (3) lawyer as advocate; (4) transactions with persons other than clients; (5) law firms and associations; (6) public service; (7) information about legal services; and (8) maintaining the integrity of the profession.<sup>55</sup> Following each rule is an explanatory comment written by the ABA and the Oklahoma committee to illustrate the meaning and purpose of the rule. The comments include Oklahoma modifications and are intended to be used only as guidelines.<sup>56</sup> In addition, the *Proposed Rules* list relevant terms to assist the attorney with the proper interpretation of the rules.<sup>57</sup>

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50. *Id.*

51. *Id.* at 2000. "Many of the Comments use the term 'should.' Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." *Id.*

52. *Id.*

53. *Id.* See Aronson, *supra* note 23, at 828 n.13 (citing several aspirational provisions of the MODEL CODE that have become mandatory rules in the MODEL RULES which Oklahoma will follow upon adoption of the *Proposed Rules*). See, e.g., MODEL CODE EC 6-4 and MODEL RULES Rule 1.3 (diligence); MODEL CODE EC 7-8 and MODEL RULES Rule 1.4(a) (communication with client); MODEL CODE EC 7-20 and MODEL RULES Rule 3.2 (expediting litigation) and 3.4(d) (frivolous discovery requests and refusal to comply with "legally proper" discovery requests of opponent).

54. See *Proposed Rules*, *supra* note 3, at 2000.

55. For a complete treatment of each rule of the *Proposed Rules* compared to the MODEL CODE, see *Proposed Rules*, *supra* note 3.

56. *Id.* at 2000.

57. *Id.* at 2001-02. Relevant terms listed under "Terminology" include:

## IV. MAJOR AREAS OF CHANGE

A. *Fees*

The subject of fees has historically been a controversial area in the *Model Code*. The Disciplinary Rules failed to regulate equitable fees by merely requiring that the fee charged not be “clearly excessive.”<sup>58</sup> The Disciplinary Rules described a clearly excessive fee as one an ordinarily prudent lawyer would be firmly convinced was excessive after reviewing the facts. The rule listed eight factors indicating the reasonableness of a fee. These same eight factors are listed in the *Proposed Rules*; however, the words “clearly excessive” are deleted.<sup>59</sup> Judicial interpretation of the “clearly excessive” definition resulted in sanctions against the attorney

“Belief” or “Believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

“Consult” or “Consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Firm” or “Law Firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, [MODEL RULES] Rule 1.10.

“Fraud” or “Fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “Known,” or “Knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

“Reasonable” or “Reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “Reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

*Id.*

58. MODEL CODE DR 2-106(A) and (B).

59. *Proposed Rules*, *supra* note 3, at 2006-07. Rule 1.5(a) states:

(a) A lawyer’s fees shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

*Id.*

only when fees charged were so excessive as to be considered unconscionable or fraudulent.<sup>60</sup>

What constitutes reasonable fees is more clearly set out in the *Proposed Rules* than in the *Model Rules*. The ABA *Model Rules* deleted the words "clearly excessive" because the former structure of the *Model Code* allowed an unacceptably high threshold rate in determining reasonable fees<sup>61</sup> by the disciplinary agencies.<sup>62</sup> The Antitrust Division of the United States Department of Justice has publicly criticized the *Model Rules* for requiring reasonable fees. The Department expressed concern over the possibility that the rule may be misconstrued to prohibit lower as well as higher fees than the prevailing rate, thus discouraging price competition.<sup>63</sup> However, the ABA has said that discouraging price competition<sup>64</sup> was not the intent of the drafters of the *Model Rules*.<sup>65</sup> To avoid this problem, the Oklahoma Committee modified the comment to make clear that the term "reasonable" relates only to unreasonably high fees and does not prohibit the lawyer from charging a low fee or no fee for his services.<sup>66</sup>

The second major change is the manner in which the fees are required to be communicated to the client. The proposed Rule 1.5(b) has no counterpart in the *Oklahoma Code Disciplinary Rules* and requires that the basis or rate of the fee be communicated to the client, preferably in writing, if the attorney has not regularly represented the client in the past.<sup>67</sup> The comment following the rule explains that it is sufficient to

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60. Walter, *supra* note 23, at 459.

61. See *United States v. Strawser*, 581 F. Supp. 875, 877 (C.D. Ill. 1984), *aff'd*, 800 F.2d 704 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1350 (1987). In *Strawser*, the attorney charged his client \$47,500 for defense representation. The highest fee charged by co-defendants' attorneys was \$12,000 for similar representation. The court found that the \$47,500 fee grossly exceeded the fee charged for similar services in the community and concluded that the fee was unreasonable. The court reduced the fee and reimbursed the client. See also *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985). This court recognized the "clearly excessive" standard used in the MODEL CODE but stated:

We are convinced that in a civil action, a fee may be found to be "unreasonable" and therefore subject to appropriate reduction by a court without necessarily being so "clearly excessive" as to justify a finding of a breach of ethics. We do not believe that the standards under the court's duty to monitor fee agreements and the court's duty to discipline attorneys are necessarily the same, or serve completely identical purposes.

*Id.* at 100.

62. See Walter, *supra* note 23, at 459.

63. *Id.*

64. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (minimum fee schedules provided by bar associations constitute anticompetitive conduct and are a violation of the Sherman Act).

65. Walter, *supra* note 23, at 459 (referring to a letter from John C. Shephard, President of the American Bar Association [hereinafter ABA] to J. Paul McGrath (Oct. 19, 1984)).

66. See *Proposed Rules*, *supra* note 3, Rule 1.5, at 2007-08.

67. *Id.* at 2007. Rule 1.5(b) states: "When the lawyer has not regularly represented the client,

state that the basis of the fee is an hourly charge, a fixed amount, an estimated amount, or a determinable amount.<sup>68</sup> When a correction is needed because of substantial, new developments, the lawyer should provide the client with a revised estimate of costs. The comment recommends the communication of fees by a written statement. A simple memorandum or fee schedule will suffice if the basis or rate of the fee is given.<sup>69</sup>

A third change is in the area of contingent fees. The proposed Rule 1.5(c) provides that a fee may be contingent on the outcome of the lawyer's services, but the fee agreement must be in writing and must state the method used to determine the fee.<sup>70</sup> The writing must include the percentages accruing to the lawyer in case of settlement, litigation, trial, or appeal. Additionally, the attorney should specify other expenses to be deducted from the recovery and state whether these expenses will be deducted before or after the recovery is calculated.<sup>71</sup> Following the tender of services, the attorney must give the client a statement of the outcome, a remittance if recovery were obtained, and a summary of the method by which the fee was determined.<sup>72</sup> The ABA Rule 1.5(d) prohibits contingent fees in matters concerning domestic relations<sup>73</sup> or criminal cases. However, Oklahoma has modified Rule 1.5(d) to allow contingent fees to

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the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." *Id.*

68. *Id.* Rule 1.5 and comment, at 2007-08.

69. *Id.*

70. *Id.* Rule 1.5(c), at 2007. Rule 1.5(c) states:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

*Id.*

71. *Id.*

72. *Id.*

73. The restriction against contingent fees in domestic relation cases was an Ethical Consideration in the MODEL CODE. *See* MODEL CODE EC 2-20.

be used in collecting past due alimony or child support.<sup>74</sup>

A fourth area of change deals with the sharing of fees. The proposed Rule 1.5(e) concerns the division of fees between lawyers who are not in the same firm.<sup>75</sup> The rule requires that payment be proportionate to services rendered by each attorney; or with written consent of the client, each attorney may assume responsibility for his share of the representation. The client must consent to the participation by all the lawyers involved, and the fee must be reasonable. Disclosure to the client of the amount of payment to each attorney is not required. Thus, the *Proposed Rules* permit division of fees without regard to the services rendered by each lawyer if the lawyers assume joint responsibility of the client's representation. This permitted division of fees without regard to the services rendered is a deviation from the *Oklahoma Code*.<sup>76</sup>

Finally, the comment following the rules concerning fees allows advance payment and payment in property for services rendered, with certain stipulations. The comment permits a lawyer to require advance payment for services but requires the lawyer to return any unearned portion.<sup>77</sup> Property may be accepted as payment for services, but such payment may be subject to special scrutiny because of questions regarding the value of the services and the special knowledge the lawyer might have regarding the value of the property.<sup>78</sup> The property interest received by the lawyer must not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation, unless it involves a lien granted by law or contract to secure the fee or a contract for a reasonable contingent fee in a civil case.<sup>79</sup>

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74. *Proposed Rules*, *supra* note 3, Rule 1.5(d), at 2007. Rule 1.5(d), as modified, states:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the result obtained, other than actions to collect past due alimony or child support; or  
(2) a contingent fee for representing a defendant in a criminal case.

*Id.*

75. *Id.* Rule 1.5(d) and comment, at 2007-08.

76. *See id.* Rule 1.5(e) and code comparison, at 2008-09. It should be noted that no fees may be given for referrals to other lawyers. Rule 7.2(i) provides:

A lawyer shall not give anything of value, either directly or indirectly, to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

*Id.* at 2055.

77. *Id.* Rule 1.5 and comment, at 2007-08.

78. *Id.*

79. *Id.* Rule 1.8(j), at 2016.

## B. Confidentiality of Information

Lawyer-client confidentiality, the most hotly debated issue in the ABA *Model Rules*,<sup>80</sup> has been modified in Oklahoma to allow the attorney greater latitude in disclosure of client information. Many lawyers believed the originally proposed rules favored third parties over the client<sup>81</sup> and, thereby, viewed the new rules as an attempt to undermine the adversary system.<sup>82</sup> The *Model Rules* ultimately became more stringent than the *Model Code* regarding disclosure by the lawyer of client's confidences, but the Oklahoma Committee modified the rule to allow more disclosure than the *Model Rules*.<sup>83</sup>

The confidentiality rule in the *Model Rules* and *Proposed Rules* applies to all information relating to a client's representation, even if the attorney had acquired the information before the attorney-client relationship existed.<sup>84</sup> No distinction is made between "secrets" and "confidences" as in the *Oklahoma Code*, because all information given to the

80. See Walter, *supra* note 23, at 456.

81. *Id.*

82. *Id.* The Revised Final Draft of the MODEL RULES OF PROFESSIONAL CONDUCT (June 30, 1982), as proposed by the Kutak Commission, varies greatly from the version that was adopted by the ABA in 1983 and allows for much more disclosure by the attorney of client confidences. The text of the 1982 draft stated in pertinent part:

Rule 1.6 Confidentiality of Information.

.....  
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;

*Id.*

83. *Proposed Rules*, *supra* note 3, Rule 1.6, at 2009. Rule 1.6, as modified, states:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer may reveal the following information to the extent the lawyer reasonably believes necessary.

(1) the intention of his client to commit a crime and the information necessary to prevent the crime.

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(3) or as otherwise permitted under these rules.

(c) A lawyer shall reveal such information when required by law or court order.

*Id.*

84. *Id.* Rule 1.6 and code comparison, at 2011-12.

attorney is considered confidential except information that must be disclosed to properly conduct the representation.<sup>85</sup> Interpretation of client confidences in current case law reveals that failure to disclose the identity of a client is not protected by the attorney-client privilege regarding the client's sixth amendment right to counsel or the fifth amendment privilege against self-incrimination.<sup>86</sup> In addition, information pertaining to legal fees, expenses, or other monies received by a lawyer on behalf of his client is not considered privileged information when requested by a grand jury investigation.<sup>87</sup>

The *Model Rules* allow the attorney to reveal information that he considers reasonably necessary to prevent the client from committing a criminal act that may result in imminent death or substantial bodily harm.<sup>88</sup> The Oklahoma committee modified this provision to allow the attorney to disclose any intent by the client to commit a crime.<sup>89</sup> The *Proposed Rules* also allow disclosure to establish a claim for fees or property owed to the lawyer or to establish a defense by the attorney when being sued by the client.<sup>90</sup> A further provision retained by the *Proposed Rules* requires that the lawyer disclose information mandated by law or court order.<sup>91</sup> Therefore, the attorney is allowed to disclose information

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85. See *supra* note 83.

86. See *State v. Casby*, 348 N.W.2d 736 (Minn. 1984) (an attorney is not privileged to assist a client in deception to the court concerning the client's true identity under the attorney-client privilege, the code of legal ethics, or the fifth and sixth amendments); *Office of Disciplinary Counsel v. Hazelkorn*, 18 Ohio St. 3d 297, 480 N.E.2d 1116 (1985) (an attorney's failure to disclose the identity of a client amounted to falsifying all records related to the case, and the attorney was indefinitely suspended from the practice of law in Ohio). See also *United States v. \$149,345 United States Currency*, 747 F.2d 1278 (9th Cir. 1984). In this case, federal drug agents seized an envelope of money addressed to an attorney and refused to give the money to the attorney unless he would reveal the identity of the sender. The attorney claimed that the money was for legal fees owed by a client but refused to disclose the identity of the client on grounds of the attorney-client privilege. The claim by the attorney for the funds seized as drug proceeds was denied.

87. See *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984). The court stated:

There can be no absolute rule that frees an attorney, merely because he is such, to refuse to give unprivileged evidence to a grand jury. Even when trials are pending, the grand jury's right to unprivileged evidence may outweigh the right of the defense bar and its clients not to be disturbed. The matter is one that turns on particular facts as evaluated by a district court.

*Id.* at 19. In this case, the subpoenas were quashed because of the pending criminal proceedings in which the subpoenaed attorneys were serving as defense counsel. In *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 246-47 (2d Cir.), *cert. denied*, 106 S. Ct. 1515 (1986), the grand jury held that to subpoena an attorney before a grand jury regarding the monies, legal fees, property or other things of value received, accepted, transferred or held by the attorney for an unindicted grand jury target will not violate the client's constitutional rights.

88. *Supra* note 82.

89. *Supra* note 83.

90. *Id.*

91. *Id.*

to protect himself and others from substantial bodily or financial harm by his client.

The comment following the Oklahoma version of the rule distinguishes types of disclosures that are adverse to the client. A lawyer's failure to disclose an intended criminal act by the client is not a violation of the rule.<sup>92</sup> However, the lawyer may not counsel or assist a client in criminal or fraudulent conduct<sup>93</sup> or use false evidence.<sup>94</sup> Sanctions will be imposed on a lawyer for assisting the client's criminal or fraudulent behavior only when the lawyer has done so knowingly.

Oklahoma has modified the *Model Rules* comment to Rule 1.6 to define the type of criminal act that would require disclosure but has retained the portion of the comment that sets out the circumstances under which the attorney may withdraw. The Oklahoma comment states that doubts should be resolved in favor of disclosure if the client's conduct will likely result in imminent death, substantial bodily harm, or substantial financial harm to another person.<sup>95</sup> The *Model Rules* comment and the

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92. *Proposed Rules*, *supra* note 3, Rule 1.6 comment, at 2010. Rule 1.6 comment, as modified, states in pertinent part:

Where the conduct is likely to result in imminent death or substantial harm to the person or financial interests of another, doubts should be resolved in favor of disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

*Id.* For the text of 1.6(b)(1), see *supra* note 83.

93. *Id.* Rule 1.2(c), at 2003. Rule 1.2(c) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

*Id.*

94. *Id.* Rule 3.3, at 2035-36. Rule 3.3 states in pertinent part:

(a) A lawyer shall not knowingly:

...

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the following remedial measures:

(A) When a client has offered false evidence, the lawyer shall promptly call upon the client to rectify the same; if the client refuses or is unable to do so, the lawyer shall promptly reveal its false character to the tribunal.

(B) When a person other than a client has offered false evidence, the lawyer shall promptly reveal its false character to the tribunal.

(b) the duties stated in paragraph (a) are continuing, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

*Id.*

95. See *supra* note 92.



Oklahoma comment advise that a lawyer withdraw from representation if his services would be used by the client to materially further a fraudulent or criminal course of conduct.<sup>96</sup>

A conflict may arise between the lawyer's duty of confidentiality to the client who offers false evidence and the lawyer's duty of candor to the court. The *Proposed Rules* add two provisions to Rule 3.3 dealing with candor toward the tribunal.<sup>97</sup> The lawyer must promptly reveal to the tribunal false evidence provided by the client if the client refuses to rectify the false evidence himself. In addition, the lawyer must reveal to the tribunal false evidence provided by a person other than the client.<sup>98</sup> The *ABA Model Rules* provide that this duty to reveal false evidence to the

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96. Withdrawal by the attorney is subject to the *Proposed Rules*, note 3, Rules 1.16(a)(1), 1.16(d), 1.8(b), 1.13(b), at 2029, 2015, 2023-24. The rules state:

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

.....

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.8 Conflict of Interest: Prohibited Transactions

.....

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

Rule 1.13 Organization as Client

.....

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

*Id.*

97. *Supra* note 94. Subparts (A) and (B) were added to Rule 3.3(a)(4).

98. *Id.*

tribunal continues to the conclusion of the proceeding.<sup>99</sup> In contrast, the *Proposed Rules* extend the duty to reveal false evidence beyond the conclusion of the proceeding.<sup>100</sup>

The Oklahoma comment favors disclosure of perjurious testimony of the criminal defendant. If the client testifies and the lawyer knows that the client has perjured himself, rectifying the situation may result in the client's conviction as well as possible prosecution for the perjury.<sup>101</sup> As a remedial measure, the comment suggests that the lawyer make disclosure to the court after confidentially remonstrating with the client concerning his perjury or false evidence and attempting to withdraw. The court then must decide whether to declare a mistrial, to disclose the perjury to the trier of fact, or to do nothing.<sup>102</sup> The comment does make exception for those jurisdictions in which the constitutional provisions of due process and the right to counsel in criminal cases have been construed to allow testimony even if counsel knows the testimony is false.<sup>103</sup>

### C. *Conflicts of Interest*

#### 1. Present and Former Clients' Interests

The rules pertaining to conflicts of interest between present and former clients are Rules 1.7 through 1.13 of the *Proposed Rules*. The general rule states that without each client's consent, a lawyer shall not

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99. MODEL RULES Rule 3.3(b).

100. *Supra* note 94.

101. Three resolutions have been proposed. One resolution is to allow the client to testify in a narrative fashion without guidance from the lawyer. *See State v. Fosnight*, 235 Kan. 52, 679 P.2d 174, 180 (1984). Fosnight asked to withdraw from the case in an in-chambers conference apart from the jury's knowledge. When Fosnight's motion for withdrawal was denied, he properly allowed his client to offer perjured testimony in a narrative fashion without guidance from Fosnight. The court held that Fosnight did not violate the CODE OF PROFESSIONAL RESPONSIBILITY, and no prejudice was inflicted on the defendant because of the in-chambers request for withdrawal by Fosnight.

A second, and more recent resolution, is that the lawyer has no duty to reveal the perjury if the perjury is that of his client. In *Nix v. Whiteside*, 475 U.S. 157 (1986), the attorney for the criminal defendant advised the client not to commit perjury. The client decided not to perjure himself, was convicted, and appealed seeking federal habeas corpus relief because he had been denied effective counsel. The court held that it was not a violation of the client's sixth amendment right to assistance of counsel when the attorney refused to assist the client to commit perjury. *See Note, Nix v. Whiteside: Is a Client's Intended Perjury a Real Dilemma?* 22 TULSA L.J. 339 (1987), for a thorough analysis of this case and perjury in general.

The third resolution is that the lawyer must reveal the client's perjury if necessary to rectify the situation. The rationale to this third approach is that the criminally accused client has a right to counsel, a right to testify, and a right to confidential communication with counsel. However, the criminally accused should not have a right to assistance of counsel in committing perjury. *See Proposed Rules, supra* note 3, Rule 3.3 comment, at 2036-38.

102. *Proposed Rules, supra* note 3, Rule 3.3 comment, at 2036-38.

103. *Id.*

represent a client if that representation would be directly adverse to another client.<sup>104</sup> Additionally, Rule 1.7 requires the lawyer to subjectively determine whether representation of a client would create an unacceptable conflict of interest by affecting the lawyer's independent professional judgment toward the other client.<sup>105</sup> However, if the lawyer is merely representing clients whose interests are only generally adverse, such as competing economic interests, the lawyer need not have consent from the clients in matters unrelated to those economic interests. Rule 1.7(b) goes beyond the *Oklahoma Code Disciplinary Rules* 5-105(A) in requiring that when the lawyer's other interests are involved, the client must consent after consultation; and the representation must not reasonably appear to be adversely affected when viewed by a disinterested lawyer.<sup>106</sup> In representing multiple clients, the lawyer must inform the parties of the advantages and risks involved. If a conflict arises in the representation of multiple clients in a particular case, the lawyer must withdraw<sup>107</sup> from

104. *Proposed Rules*, *supra* note 3, Rule 1.7(a), at 2012. See *In re Boivin*, 271 Or. 419, 533 P.2d 171 (1975). The accused lawyer involved himself in a business transaction with the client to sublease the lawyer's property for use as a restaurant and negotiated the sale of the client's restaurant. In negotiating the sale, the lawyer represented both the seller and the buyer. The court held that it is improper for an attorney to represent both the buyer and the seller in a transaction without full disclosure and consent of the parties. In cases involving an unsophisticated client, disclosure may not exonerate the lawyer. The court held that it is improper for a lawyer to represent a client in a business transaction with the lawyer.

105. *Proposed Rules*, *supra* note 3, Rule 1.7, at 2012. Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

*Id.*

106. *Id.* at 2015.

107. See *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986). This case deals with attorneys who are representing a class action wherein part of the class decides to settle. To apply the traditional principles governing disqualification of attorneys on grounds of conflict of interest would seemingly dictate that the lawyer should withdraw entirely. The court here, however, concluded that there must be a balancing of the interests of various groups of class members, the interest of the public, and the interests of the court in achieving a just and expeditious resolution of the dispute. Relevant considerations to determine disqualification in class action representation include: "[T]he amount and nature of the information that has been proffered to the attorney, its availability elsewhere, its importance to the question at issue, such as settlement, as well as actual prejudice that may flow from that information." (quoting *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 165 (3d Cir. 1984) (Adams, J., concurring), *cert. denied*, 472 U.S. 1008 (1985)).

representation of all the clients involved.<sup>108</sup>

The proposed Rule 1.9 concerns conflicts of interest with former clients and has no direct counterpart in the *Oklahoma Code*. A lawyer may not represent a client in a substantially related matter that is adverse to a former client, without the former client's consent.<sup>109</sup> Information gained from representing a former client may not be used against the client unless the information is generally known.<sup>110</sup>

## 2. Attorneys' Interests

Although the *Proposed Rules* do not deviate significantly from the *Oklahoma Code* in dealing with prohibited transactions which may create a conflict of interest between the attorney and the client, some new provisions have been added.<sup>111</sup> The *Proposed Rules*, unlike the *Oklahoma Code*, prohibit the preparation of an instrument giving the lawyer or the lawyer's parents, children, or siblings a substantial gift from a client, unless that client is related to the lawyer.<sup>112</sup> The *Model Rules* provide that the lawyer may pay litigation expenses for a client with repayment contingent on the outcome of the lawsuit.<sup>113</sup> In addition, the lawyer may pay litigation expenses for the indigent client.<sup>114</sup> Oklahoma has modified these provisions so that the lawyer may advance litigation expenses, but the client remains ultimately liable for those expenses.<sup>115</sup>

Two changes from the *Oklahoma Code*, regarding personal malpractice and adversarial representation by related attorneys, appear under "Prohibited Transactions." The *Proposed Rules* and the *Oklahoma Code* do not allow the lawyer to make an agreement with the client limiting the lawyer's prospective liability for malpractice. However, the *Proposed Rules* require that in order to settle a claim with the client, an attorney must advise the client in writing to seek independent counsel.<sup>116</sup> Another change requires that a lawyer, who has a family relationship with the lawyer directly adverse to the client's case, may not represent the client without consultation and consent concerning the lawyer's adverse

108. *Proposed Rules*, *supra* note 3, Rule 1.7 and comment, at 2012-14.

109. *Id.* Rule 1.9, at 2017-18.

110. *Id.*

111. *Id.* Rule 1.8, at 2015-16.

112. *Id.* at 2015.

113. MODEL RULES Rule 1.8(e).

114. *Id.*

115. *Proposed Rules*, *supra* note 3, Rule 1.8(e), at 2015.

116. *Id.* Rule 1.8(h) and comment, at 2016-17.

relationship.<sup>117</sup>

### 3. Associates' and Partners' Interests

Oklahoma has broadened the *Model Rules* dealing with imputed disqualification<sup>118</sup> to require disqualification of an entire law firm if a lawyer in the firm would be disqualified by any of the provisions under "Prohibited Transactions."<sup>119</sup> The ABA and the Oklahoma Committee agree that imputed disqualification would also apply to an entire firm when any person would be disqualified because of a conflict of interest<sup>120</sup> or because at least one client does not feel that the lawyer could serve the client's best interests. However, when a lawyer leaves a firm, the firm is not prohibited from representing a client with materially adverse interests to a client of the formerly associated lawyer. The determining factor is whether other lawyers in the firm had information that should be protected under the rules or whether the matter involved is substantially the same as the previous representation.<sup>121</sup>

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117. *Id.* Rule 1.8(i), at 2016. Rule 1.8(i) states: "A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

118. *Id.* Rule 1.10, at 2018-19.

119. *Id.* Rule 1.8, at 2015-16.

120. *See, e.g.,* *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981).

We do not believe the strict standards of *Cinema 5* are inevitably invoked whenever a law firm brings suit against a member of an association that the firm represents. . . . That burden is properly imposed when a lawyer undertakes to represent two adverse parties, both of which are his clients in the traditional sense. But when an adverse party is only a vicarious client by virtue of membership in an association, the risks against which Canon 5 guards will not inevitably arise.

*Id.* at 749. *See, International Business Mach. Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978) (when there exists a doubt as to an asserted conflict of interest, resolution should be in favor of disqualification); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978). In regard to representation of a client adverse to a former client, the court held that "consent by a client to representation of an adverse party is not a defense to that former client's motion for disqualification, such as the one under review here, based on the possibility that confidential information will be used against the former client." *Id.* at 229. *See, Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976). *Cinerama* involved not a former client, but an existing client. One firm, in which the attorney was a current partner, was suing an actively represented client of another firm in which the same attorney was a current partner. The court held that the "substantial relationship" test does not set a sufficiently high standard to determine disqualification when it concerns an existing client. When the representation is a continuing one, adverse representation is *prima facie* improper.

121. *Proposed Rules, supra* note 3, Rule 1.10(c)(1) and (2), at 2019. Similarly, if a lawyer did not acquire knowledge of information relating to a certain client of a law firm, and that lawyer later joins another firm, neither that lawyer nor any other lawyer in the firm would be disqualified from representing a client with adverse interests. *See Proposed Rules, supra* note 3, Rule 1.10 comment, at 2020-21.

#### 4. Former Interests

The *Proposed Rules* include provisions, concerning successive government and private employment, to prevent a lawyer from exploiting public office for the benefit of a client.<sup>122</sup> A lawyer who has substantially and personally participated as a public officer or employee in a certain matter cannot later represent a private client in the same matter without first obtaining permission from the government agency, unless expressly permitted by law. Further, no other lawyer in the firm may represent the client unless the concerned government agency receives written notice, the disqualified lawyer is screened from any participation, and the disqualified lawyer receives no portion of the fee.

The *Proposed Rules* also address successive private employment of adjudicative officers, arbitrators, and law clerks. Under the proposed Rule 1.12, a judge or other adjudicative officer, arbitrator, or law clerk who has substantially or personally served in a matter may not represent anyone in connection with that matter without disclosure and consent of all parties involved. A lawyer, serving as a law clerk to a judge or adjudicative officer,<sup>123</sup> may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally or substantially, but only after notifying the judge and opposing counsel. In contrast, the comment explains that the former judge is not prohibited from representing a client if the judge was only incidentally involved in the previous matter before the court.

#### 5. Organizations' Interests

Finally, a new rule offers guidance in representing an organization rather than an individual. The lawyer's obligation is to act in the organization's best interests, rather than the individual officer's or director's best interests.<sup>124</sup> If the lawyer knows that an officer or employee is acting in a manner that could substantially harm the best interests of the organization, the lawyer is to discourage such conduct with as little disruption as possible.<sup>125</sup> Measures suggested include trying to persuade the offender to reconsider the matter or to seek independent counsel to present

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122. *Proposed Rules*, *supra* note 3, Rule 1.11 comment, at 2022.

123. *Id.* Rule 1.12 comment, at 2023. The comment states: "The term 'adjudicative officer' includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges." *Id.*

124. *Id.* Rule 1.13, at 2023-24.

125. *Id.*

his or her views to the appropriate authority in the organization.<sup>126</sup> Another option for the lawyer is to report the offender to a higher authority in the organization.<sup>127</sup> If the authority condones illegal activity that could cause substantial injury to the organization, the lawyer may withdraw from representation, subject to the rules of professional conduct.<sup>128</sup> A lawyer may also represent employees and others in the organization in which he or she is counsel, provided that there is no conflict of interest.<sup>129</sup>

#### D. *Advertising and Solicitation*

With regard to advertising and solicitation, the Oklahoma Model Rules Committee essentially recommends adoption of the latest amended version of the *Oklahoma Code* as enacted in 1983.<sup>130</sup> This is embodied in the proposed Rules 7.1 through 7.5. Rule 7.1 prohibits communicating false or misleading information about the lawyer or the lawyer's services and lists four examples of what could constitute a misleading communication.<sup>131</sup> Advertisements which claim no cost to the client in regard to recovery might create a problem because the *Proposed Rules* require that the client must remain ultimately liable for expenses, including court costs.<sup>132</sup>

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126. *Id.*

127. *Id.*

128. *Id.* Rule 1.16, at 2029-30. The lawyer is subject to Rule 1.16 "Declining or Terminating Representation." Oklahoma has changed this rule from the MODEL RULES to require mandatory withdrawal from representation of a client upon two additional grounds listed by the MODEL RULES as permissive. These grounds are Rule 1.16(a)(3) ("the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent") and Rule 1.16(a)(4) ("the client has used the lawyer's services to perpetrate a crime or fraud").

129. *Id.* Rule 1.13(e), at 2024.

130. Compare the CODE OF PROFESSIONAL RESPONSIBILITY, OKLA. STAT. tit. 5, ch. 1, app. 3 (1981 & Supp. I 1986) to *Proposed Rules*, *supra* note 3.

131. *Proposed Rules*, *supra* note 3, Rule 7.1(a), at 2054-55. Rule 7.1(a) states:

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it is:

(1) a communication which contains a material misrepresentation of fact or law, or omits information necessary to make the communication, considered as a whole, not materially misleading; or

(2) a communication which is likely to create an unjustified expectation about the results the lawyer can achieve; or

(3) a communication which states or implies the lawyer can achieve results by means that violate a law, rule, regulation or judicial, executive or administrative order or the Rules of Professional Conduct; or

(4) a communication which compares the lawyer's services with other lawyer's services when the comparison cannot be factually substantiated.

*Id.*

132. *Id.* Rule 1.8(e), at 2015.

Assuming that an advertisement contains no false or misleading information, the lawyer may advertise his or her services through the telephone directory, legal directory, newspaper, radio, television, or written communication, provided solicitation is not involved.<sup>133</sup> Solicitation includes communication directed toward a specific person but does not include communications for general distribution.<sup>134</sup> The lawyer may pay for the advertising but is prohibited from giving anything of value to anyone recommending the lawyer's services, other than to non-profit legal services.<sup>135</sup> A lawyer must keep a record of the advertisement for three years to prove that the advertising was within the bounds of the law, and the advertisement must include the name of at least one lawyer responsible for the advertising.<sup>136</sup> If an advertisement is mailed, the lawyer must maintain a record naming those people contacted by the mailing for three years.<sup>137</sup> The words, "This is an advertisement," must be printed at least as largely as the address on the front of each letter or postcard.<sup>138</sup>

If the lawyer advertises a fee, he must abide by that fee for a specified time. If there is no fixed date for the succeeding issue of the publication, the lawyer will be held to that fee for a reasonable time, but in no

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133. See *supra* note 37.

134. *Proposed Rules, supra* note 3, Rule 7.3, at 2056-57. Rule 7.3 states:

(a) A lawyer may not solicit professional employment from a prospective client under circumstances not described in Rule 7.3(b), when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

(b) Except under the circumstances described in Rule 7.3(c), a lawyer may solicit professional employment if the prospective client is a close friend, relative, former client if the contact pertains to the former employment, or one whom the lawyer reasonably believes to be a client.

(c) Notwithstanding the provisions of Rules 7.3(a) and (b), a lawyer shall not contact or cause to be contacted, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or
- (3) the communication involves coercion, duress or harassment.

*Id.*

135. *Id.* Rule 7.2(i), at 2055.

136. *Id.* Rule 7.2(b) & (d).

137. *Id.* Rule 7.2(c).

138. *Id.* Rule 7.2(e).



event less than one year.<sup>139</sup> If the publication is more frequent than monthly, the lawyer will be held to the fee stated for thirty days after publication.<sup>140</sup> If the publication is issued less frequently than monthly, the lawyer is held to the fee until the next publication date. If the publication is made through any electronic media, the fee stated is to be effective for thirty days beyond the last broadcast.<sup>141</sup>

In-person solicitation is prohibited unless the prospective client is a close friend, a relative, a former client concerning the former representation, or a person that the lawyer reasonably believes to be a client.<sup>142</sup> The lawyer may never contact a prospective client who he knows or should know is suffering from physical, mental, or emotional impairment that could interfere with that person's judgment in employing the lawyer.<sup>143</sup> In addition, contact with a prospective client is prohibited if the communication involves duress, harassment, or coercion.<sup>144</sup>

Information appearing in law firm names and letterheads is restricted. The letterhead may communicate that the lawyer concentrates in a particular field of law, but it cannot state that the lawyer is a specialist unless the lawyer has been certified in that particular field by the Supreme Court of Oklahoma.<sup>145</sup> The name of a private law firm must not indicate that the firm is connected with a government agency or charitable legal service organization.<sup>146</sup> Furthermore, law firms with offices in different jurisdictions may use the same name in all of the jurisdictions but must indicate which lawyers are licensed in that particular jurisdiction.<sup>147</sup> A lawyer who is serving in public office should not be included in the firm name when he is not actively and regularly practicing in the firm.<sup>148</sup>

#### E. *Duties of Subordinate Attorneys and Nonlawyer Assistants*

New changes made by the *Proposed Rules* concerning the duties of subordinate lawyers and interns have significant impact on the Oklahoma lawyer. They are of special significance in this state because

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139. *Id.* Rule 7.2(h).

140. *Id.*

141. *Id.* Rule 7.2(g).

142. *See supra* note 134.

143. *Id.*

144. *Id.*

145. *Proposed Rule, supra* note 3, Rule 7.4, at 2058-59.

146. *Id.* Rule 7.5(a), at 2059.

147. *Id.* Rule 7.5(b).

148. *Id.* Rule 7.5(c), at 2059-60.

Oklahoma licenses law students as legal interns after completion of fifty hours of course study and after passing the Multistate Professional Responsibility Examination or an examination prepared by the Legal Internship Committee.<sup>149</sup> In addition, the legal intern must be supervised by a practicing attorney and be enrolled in an appropriate law school course as designated by the dean of the respective school.<sup>150</sup>

A lawyer is bound by the rules of professional conduct even though the lawyer may have been acting under the direction of another person.<sup>151</sup> However, a subordinate lawyer does not violate the rules of professional conduct when acting under the direction of a supervisory lawyer's reasonable resolution of an arguable question of professional duty.<sup>152</sup> In addition, the comment states that although a lawyer is held accountable for his actions when acting under the direction of another attorney, the lawyer must have knowledge that these actions are a violation. The subordinate capacity of the lawyer would be taken into account in deciding whether the attorney had the required knowledge. Further, in a supervisor-subordinate relationship, the supervising attorney ordinarily should assume the responsibility for making ethical judgments, thus allowing for a single course of action.

The *Proposed Rules* would hold the lawyer responsible for a nonlawyer assistant's conduct if the lawyer has knowledge of the conduct or has ratified it.<sup>153</sup> Included in the category of nonlawyer assistants are secretaries, investigators, law student interns, and paraprofessionals.<sup>154</sup> The comment stresses the importance of instructing the assistants about disclosure of client information and stresses that these assistants are not legally trained; therefore, they are not subject to professional discipline.

## V. CONCLUSION

Oklahoma has the opportunity to improve the regulation of legal ethics by adopting the *Model Rules* as modified by the Oklahoma Model Rules Committee. However, the *Proposed Rules* will not escape criticism

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149. OKLA. STAT. tit. 5, ch. 1, app. 6 (1981 & Supp. I 1986). An oral examination may be given in place of a written examination, but the applicant must be approved by a panel of practicing attorneys mandated by the Supreme Court of Oklahoma. If a written examination is given, it may be the Multi-State Professional Responsibility Examination, an examination prepared by the Oklahoma Legal Internship Committee, or both.

150. *Id.*

151. *Proposed Rules*, *supra* note 3, Rule 5.2(a), at 2048.

152. *Id.* Rule 5.2(b).

153. *Id.* Rule 5.3(c)(1), at 2048-49.

154. *Id.* Rule 5.3 comment, at 2049.

from the legal community. These complaints aside, the *Proposed Rules* represent a collective effort by the Oklahoma Committee to provide a workable legal ethics standard to meet the needs of the Oklahoma lawyer and the general public. The recognized need for uniformity among the different jurisdictions has been balanced against the need for different resolutions in certain areas peculiar to Oklahoma. The comments to the *Proposed Rules*, although not authoritative, should be of great assistance to the lawyers in this state as they will provide needed guidance to the interpretation of the rules. The impact of the new *Proposed Rules* will not be realized until the rules are implemented for a time, and the legal community and the general public can evaluate their effects in concrete factual situations.

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